

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BCI COCA-COLA BOTTLING
COMPANY of LOS ANGELES

and

Case 28–CA–022792

WAYNE ABRUE

Sandra Lyons, Esq., for the General Counsel.
Douglas M. Topolski, Esq. (McGuire, Woods, LLP),
of Baltimore, Maryland, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. The Board has recently confirmed its support for the long-standing deferral policies under *Collyer Insulated Wire*, 192 NLRB 837 (1971). *Sheet Metal Workers, Local 18 (Everbrite LLC)*, 359 NLRB No. 121 (2013). For decades now the Board's deferral policies has been well settled, in large part thanks to the seminal General Counsel Memorandum 73-31. This case serves as a reminder that those policies have successfully defined the rules of the game and should not be flippantly ignored.

The complaint in this case alleges that Coca-Cola violated Section 8(a)(3) and (1) by laying off eight employees because of their union activities and also independently violated Section 8(a)(1) by making unlawful statements. The employees at the time were represented by a labor organization and were covered by a collective-bargaining agreement. The General Counsel asserts that Coca-Cola wanted to lay off Wayne Abrue, the Charging Party, because he was an activist shop steward and it laid off the other seven employees in order to get to Abrue. Coca-Cola asserts that it selected the employees for lay off in accordance with the contract with the Union; the General Counsel counters that Coca-Cola's past practice was not entirely consistent with its interpretation of the contract. Coca-Cola asserts that complaint allegations were settled with the Union after grievances were filed. As described below, the Union ultimately agreed with Coca-Cola's interpretation of the contract and concluded it could not convince an arbitrator that Coca-Cola breached the contract. In other words, this is an ideal case

for the deferral to the grievance-arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971). But, alas, first the General Counsel and then the Board itself have refused to do so.

I issued my original decision in this case on September 28, 2012. In that decision I concluded that the General Counsel incorrectly deferred this case under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), instead of under *Collyer*. I pointed out the differences between the two types of deferral. Under *Dubo*, if the grievance is not arbitrated, then the Region proceeds to complete the investigation of the case; under *Collyer*, if the grievance is not arbitrated or properly settled the case is dismissed. A union is not *requested* to arbitrate a *Collyer* deferred case, it is instructed to do so or else the case will be dismissed. Equally important is the fact that when a case is deferred under *Collyer*, the parties realize that the General Counsel has investigated the case and has determined that the case has at least “arguable merit.” No such determination is made when a case is deferred under *Dubo*; such a case may be entirely without merit. This difference is not simply a matter of words. It may impact the way in which the parties process or resolve the underlying grievance. In an attempt to correct this significant error I ordered that the case be correctly deferred under *Collyer* to allow the Union, Coca-Cola, and the Charging Party to properly assess their actions knowing the correct consequences. The Board reversed. The Board held that I should have assessed whether the grievance settlement reached in this case meets the standards laid out in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). Implicitly the Board concluded that it made no difference whether the parties are correctly advised of the consequences of failing to take a grievance to arbitration or even of the General Counsel’s assessment as to the possible merits of the case; the parties would act the same in any event. The Board cited *Alpha Beta Co.*, 273 NLRB 1546, 1547, enfd. 808 F.2d 1342 (9th Cir. 1987), and *Postal Service*, 300 NLRB 196, 197 (1990), as authority for its holding. But neither case involved the situation here, namely a case that should have been deferred under *Collyer*; those cases simply did not address this issue. The Board stated:

This is true whether the unfair labor practice charge was deferred under *Collyer*, deferred under *Dubo*, or never deferred. *Alpha Beta*, 273 NLRB at 1547.

But the Board in *Alpha Beta* most did *not* say what this Board said it said, not even in dicta as that case did not involve a *Collyer* deferral case. Nonetheless, I recognize that I am bound to apply Board law. The problem, however, is that the Board does not typically issue ipse dixit rulings. Rather, it generally recognizes that cited cases are not directly on point and then explains why, in light of the differences, it decides to apply those cases to a different situation.

And to make matter worse the Board then went on to order, sua sponte, that I:

[S]hall decide the complaint allegations that Respondent violated Section 8(a)(1) by making threats of futility, layoffs, and other unspecified reprisals. These allegations were not addressed by any party at the hearing or in the briefs, but they have not been dismissed.”

Of course these allegations were not addressed for the obvious reason that those allegations were subsumed as part of the deferral. For decades now it has been the Board policy to defer these type 8(a)(1) allegations as part and parcel of deferring the 8(a)(3) allegations. The Board simply

ignored decades of precedent. When Coca-Cola pointed this out to the Board in a motion for reconsideration, the Board refused to acknowledge its error and stated “We . . . reject Respondent’s argument that the Board erroneously remanded the 8(a)(1) allegations for *consideration* by the judge.” (Emphasis added.)¹ But the Board continued:

Nevertheless, nothing in the April 30 order forecloses the Respondent from arguing to the judge that the 8(a)(1) allegations in fact were resolved by the settlement and thus should be dismissed if the settlement warrants deferral under *Spielberg*, *supra*, and *Olin Corp.*, *supra*.

So as I read the Board’s instructions to me, I am to resolve the 8(a)(1) allegations on their merits; the Board confirmed this instruction was not erroneous. Understandably, this is the position the General Counsel takes at the remand hearing and reiterates in his post-hearing brief. But Coca-Cola argues to me that I should not do so. What am I to make of this? I conclude what the Board lacked the intellectual integrity to conclude: That its remand order instructing me to decide the 8(a)(1) allegations on the merits without first determining whether they were subsumed by the grievance settlement was erroneous. At the remand hearing I decided to proceed in the only manner that was consistent with existing law, notwithstanding the Board having twice instructed me to determine the merits of the independent 8(a)(1) allegations without regard to the grievance settlement.

I. FACTS REGARDING DEFERRAL

The remanded portion of this case was tried in Phoenix, Arizona, on July 23, 2013. At that hearing I limited the scope of the evidence to whether or not the grievance settlement met the Board’s deferral standards. The grievances stem from a layoff that occurred in November 2009. Heriberto Perez was the Union’s vice president for the West Coast Region at that time; his duties included overseeing the contract the Union had with Coca-Cola. Perez admitted that the Union knew that it was apparent that layoffs were coming; remember the country was then in the midst of the Great Recession. The dispute between the Union and Coca-Cola concerned which employees should be laid off. Coca-Cola laid off the employees according to seniority in their job classification, the Union argued that the employees should have laid off according to departmental seniority; each cited different provisions in the collective-bargaining agreement for support. After the parties were initially unable to resolve the matter through the grievance procedure the Union was faced with the decision of whether to take the grievances to arbitration. Perez consulted with his superiors concerning that matter; he argued in favor of arbitrating the grievances. His superiors, however, concluded that the Union would not prevail in arbitration and therefore decided not to go to arbitration. They ultimately agree with Coca-Cola’s interpretation of the contract.

Perez and his subordinates also examined the facts to determine whether Coca-Cola included the Charging Party in the layoffs because of his actions as union steward. Remember that the Union ultimately concluded that the contract allowed Coca-Cola to lay off employees according to their classification seniority and that therefore the Charging Party was properly

¹ Of course, this is not an accurate statement; the Board did not simply remand these allegations to me for my consideration. Rather, it ordered me to resolve them on their merits.

among those selected for lay off and that the layoffs were expected because of declining business.² In conducting its investigation the Union spoke with the Charging Party and several other employees. Perez concluded that the Union:

5 [W]as never provided with . . . specifics other than a lot of hearsay or gossip stuff that was heard through the grapevine or whatever, but nothing substantial that I could produce to argue with counsel for . . . evidence to proceed on that.

10 I conclude that the Union refused to take the grievances to arbitration, and that it did so because it reasonably concluded, from its point, that the grievances did not have merit. Of course, it did not know the General Counsel felt otherwise, but as described above the Board has concluded that this is irrelevant.

15 Under these circumstances, the Union agreed to settle the grievances by payment of \$3000 to each laid off employee and include the language in the settlement agreement, described in my earlier decision, concerning its investigation into the 8(a)(3) allegations. None of the alleged discriminatees agreed to accept the settlement, and it appears that several objected to it. The General Counsel calculates net backpay for the alleged discriminatees as follows:

- 20 1. Wayne Abreu—\$74,941
2. James Conway—\$104,044
3. Othon Garcia—\$120,198
4. Heath Gessner—\$19,659
5. Chris Langley—\$71,886
25 6. Craig Stevenson—\$27,594
7. Tony Peden—\$70,490
8. Donnell Winston—\$94,373

30 The parties stipulated that the charge in Case 28–CB–074569 alleged that the Union breached its duty of fair representation by its handling of the grievances at issue. After conducting an investigation of the merits of the charge the General Counsel solicited withdrawal of the charge and the charge was withdrawn. In other words, there is no evidence that the Union breached its duty of fair representation in settling the grievances as it did.

35 II. ANALYSIS

I now apply the *Spielberg/Olin* standards in a manner consistent with *Alpha Beta*, supra, to assess whether the Board should defer to the grievance settlement. First, the grievance proceedings were fair and regular. Coca-Cola claimed the contract required it to select
40 employees for lay off based on classification seniority while the Union claimed the contract required that the employees be laid off based on departmental seniority. The Union advocated as best it could through all the pre-arbitration steps of the grievance procedure. Next, I conclude that all parties, including the Charging Party and the other alleged discriminates, agreed to be bound by the result of the grievance procedure. This is so both because the alleged

² The General Counsel's theory is that the other seven employees were selected for lay off in order to disguise Abrue's unlawful lawful.

discriminatees themselves invoked the grievance procedure by filing grievances and because the Union is the representative of those employees in the grievance process. In other words, as a matter of law the employees have agreed to be bound by the actions of their collective-bargaining representative, at least in the absence of any evidence that the Union acted outside of the broad boundaries of its duty of fair representation. The next *Spielberg/Olin* standard is whether the “arbitrator” considered the unfair labor practices in the sense that the arbitrator was generally presented with the evidence concerning the unfair labor practice. In this case the question must be whether the Union adequately considered the evidence of any unfair labor practice, because the grievances never made it to arbitration. I conclude the Union has done so. It fully considered the contractual aspect of the layoffs and it ultimately concluded that the contract required Coca-Cola to act as it did. And the Union interviewed the Charging Party and other alleged discriminatees. In the absence of evidence to the contrary I conclude those employees told the Union much of the same things that those employees told the General Counsel during the investigation of the charge and form the basis of the independent 8(a)(1) allegations. Finally, I assess whether the grievance settlement is repugnant to the Act. In this regard, the General Counsel argues that the issue must be assessed as if the complaint allegations are meritorious. If this is the test, then the settlement is clearly repugnant because it provided only for a tiny fraction of backpay and no reinstatement. But I conclude that the General Counsel misapplies the standard. Rather, the test must be as if an arbitrator (or here the Union) has considered the complaint allegations and concluded they were without merit. Having concluded that the grievances (and implicitly the complaint allegations) lacked merit there is nothing repugnant about a failure to grant relief. I conclude that the grievance settlement meets the standards for deferral and I dismiss the complaint.

I further conclude that the analysis in the preceding paragraph was entirely unnecessary. This is so because the charge should have been deferred under *Collyer* and the Union simply refused to process the grievances through arbitration or settle them in a manner satisfactory to all parties. When a union refuses to arbitrate a case under these circumstances, the result is dismissal of the charge.³ As I stated in my previous decision, to conclude otherwise would fundamentally alter the well-settled principle that deferral under *Collyer* is not a request to arbitrate but rather an order to do so.

Finally, in his brief the:

General Counsel would also urge the ALJ and the Board to modify its approach to pre-arbitral deferral cases by applying current non-Board settlements practices, including review under *Independent Stave*, 287 NLRB 740 (1987).

However, the General Counsel does not present any arguments as to why existing law should be changed or how the application of *Independent Stave* would impact the Board’s deferral policy. In the absence of such arguments I am unable to make any recommendation to the Board as to whether it should consider changing existing law.

³ I have repeatedly asked the General Counsel whether he agrees with this statement of the law and if not to explain why. The General Counsel has just as consistently refused to do so. For some reason it seems intellectual integrity appears in short supply in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

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The complaint is dismissed.

Dated, Washington, D.C. August 29, 2013

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William G. Kocol
Administrative Law Judge

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.